No. 80-772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ENVIRONMENTAL DEFENSE FUND, INC.,
Petitioner,

v.

DOUGLAS M COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

CIBA-GEIGY CORPORATION,
Respondent-Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF CIBA-GEIGY CORPORATION IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Section 6 of the Federal Insecticide, Fungicide and Rodenticide Act provides for a public hearing to challenge the Administrator's determination to retain with additional safeguards and not to cancel a pesticide registration.

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Petition	5
1. The Case Presents No Issues of Special Importance	5
2. The Court of Appeals Fully Considered and Correctly Decided the Case	7
Conclusion	11

TABLE OF AUTHORITIES

	Page
CASES	
Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970)	6,9n.8
STATUTES AND REGULATIONS	
The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (1976)	1
7 U.S.C. § 136a(c)(5) (1976)	10
7 U.S.C. § 136a(c)(5)(C) (1976)	2
7 U.S.C. § 136a(d)(3) (1976)	10,10n.9
7 U.S.C. § 136d(b) (1976)	2
7 U.S.C. § 136d(b)(1) (1976)	2,7
7 U.S.C. § 136d(d)(1976)	2
7 U.S.C. § 136n(a) (1976)	2,5,9
7 U.S.C. § 136n(b) (1976)	2,9
40 C.F.R. § 162.11 (1980)	3
43 Fed. Reg. 29,824 (1978)	3
43 Fed. Reg. 29,829 (1978)	3
44 Fed. Reg. 9550 (1979)	3,8,11
44 Fed. Reg. 9551 (1979)	3n.2
45 Fed. Reg. 52,628 (1980)	6
RULES	
Supreme Court Rule 17	5
MISCELLANEOUS	
118 Cong. Rec. 32,259 (1972)	8n.7

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STATEMENT OF THE CASE

As the United States Court of Appeals for the District of Columbia Circuit recognized, the sole issue raised by this case is a "very narrow" question of statutory construction under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* (1976) (Opinion at 28-29).[1]

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[1] The court's opinion is reprinted in Appendix A to the Petition.

FIFRA authorizes the Administrator of the United States Environmental Protection Agency to register pesticides on a use-specific basis if he determines that usage will not result in "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C) (1976). Should it subsequently appear, however, that a registered use "generally causes unreasonable adverse effects," the Administrator may issue, under Section 6(b)(1) of FIFRA, a notice of his intent to cancel (or to change the classification of) the registration for such use. 7 U.S.C. § 136d(b)(1) (1976). Section 6(b) provides that the cancellation action announced in the notice shall become final and effective at the end of thirty days, unless within that time "a request for a hearing is made by a person adversely affected by the notice." In the latter event, the formal, trial-type public hearing required by Section 6(d) is held. 7 U.S.C. § 136d(d) (1976). Following the hearing, the Administrator issues a final order which is subject to review in the courts of appeals in accordance with Section 16(b) of the Act. 7 U.S.C. § 136n(b) (1976).

FIFRA also specifies the procedure to be followed when the Administrator finds it unnecessary to initiate cancellation of a registered pesticide use. The recourse afforded by the statute to parties aggrieved by such a determination is judicial rather than administrative. Section 16(a) expressly provides that "Agency *refusals to cancel* or suspend registrations or change classifications not following a hearing and other final Agency actions not committed to Agency discretion by law are judicially reviewable in the district courts." 7 U.S.C. § 136n(a) (1976) (emphasis added).

This case arises because petitioner Environmental Defense Fund ("EDF") is dissatisfied with EPA's February, 1979 decision not to cancel the registered citrus uses of Chlorobenzilate, a miticide which had been registered for usage on a variety of crops. (As to all crops other than citrus, EPA did initiate cancellation.) EPA's decision was reached after a comprehensive, three-year scientific review, begun in May, 1976 and conducted under the Agency's Rebuttable Presumption Against

Registration ("RPAR") procedures. *See* 40 C.F.R. § 162.11. During this review, the Agency assessed the relative risks and benefits of each of Chlorobenzilate's registered uses. As to the citrus uses, for which EPA found there to be no acceptable alternatives to Chlorobenzilate, the Agency concluded that restricting usage to certified applicators, and requiring them to wear adequate protective clothing, would avert any unreasonable adverse effects and thereby warrant continued registration. *See* 44 Fed. Reg. 9550, 9551 (1979). Throughout the RPAR review, interested parties, including EDF and respondent-intervenor Ciba-Geigy Corporation (the principal manufacturer of Chlorobenzilate), were invited to present and in fact did present for EPA's consideration, pertinent information on risks and benefits, and their views on what regulatory actions the Agency should initiate. *See* 43 Fed. Reg. 29,824 and 29,829 (1978).

The RPAR review of Chlorobenzilate was concluded on February 13, 1979 when the Deputy Assistant Administrator for Pesticides published in the *Federal Register* a notice which in substance announced initiation of three distinct regulatory actions:

> 1. Cancellation of all registrations for non-citrus uses of Chlorobenzilate;
>
> 2. Retention of all registrations for citrus uses of Chlorobenzilate upon the condition that such registrations subsequently be amended to incorporate the additional usage safeguards specified in the notice; and
>
> 3. Cancellation of any individual registration for citrus uses of Chlorobenzilate not subsequently amended to incorporate the additional safeguards specified in the notice.[2]

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[2] See 44 Fed. Reg. 9551 (1979). The Agency describes the first action as "unconditional cancellation" of the non-citrus registrations. Although the second action in reality is a determination to *retain* the citrus registrations with additional safety restrictions, EPA labels the second and third actions together as "conditional cancellation" of the citrus registrations.

Ciba-Geigy did not object to the foregoing set of regulatory actions, and accordingly, the company did not request a hearing.[3] EDF, however, objected to the Agency's decision to retain the citrus registrations, and requested an adjudicatory hearing, purportedly provided by Section 6(b) of FIFRA. EPA's Chief Administrative Law Judge afforded EDF an opportunity to show cause why its request for hearing should not be dismissed, and following consideration of argument, dismissed EDF's request. Respondent Administrator affirmed, and EDF sought review in the court of appeals.

EDF and EPA directed their appellate arguments to the question of whether EDF is an "adversely affected" party within the meaning of Section 6(b). The court agreed with Ciba-Geigy, however, that EDF's asserted right to a hearing turns on a more fundamental point: "... does Section 6(b) compel the EPA to hold an administrative hearing when the only proferred objection concerns the retention portion of a notice of cancellation?" (Opinion at 29).[4] The court held that Section 6(b) of the Act does not authorize a public hearing on the subject of an Agency decision to *retain* (albeit with additional restrictions) and not to cancel a pesticide registration:

> [W]e do not reach the issue of whether EDF is adversely affected by the notice because we conclude that no hearing right is available to challenge only the retention or permissive portion of a cancellation notice.

Id. at 28. The court noted that Section 6(b) speaks only in terms of hearings on *cancellation* actions. As to EDF's dissatisfaction with EPA's decision to retain with additional restrictions and not to cancel Chlorobenzilate's citrus registrations, the court observed that FIFRA provides for district court review under Section 16(a) of FIFRA. *See* Opinion at 32.

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[3] Several Chlorobenzilate user groups objected to the stringency of the new restrictions on the citrus uses, but their requests for a hearing were dismissed as untimely and are not at issue.

[4] The National Agricultural Chemicals Association, which is the principal trade association for agricultural pesticide manufacturers, participated in the proceedings below as an *amicus curiae* in support of Ciba-Geigy's position.

The court decided the case on July 17, 1980, and EDF's petition for rehearing *en banc* was denied on August 18, 1980. Chlorobenzilate citrus registrations (as newly restricted) remain in effect, and the other uses of the pesticide have been cancelled pursuant to the Agency's notice.

REASONS FOR DENYING THE PETITION

1. The Case Presents No Issues of Special Importance

There are no "special or important reasons" in this case which warrant the granting of the writ of certiorari sought by EDF under Supreme Court Rule 17. The case does not involve constitutional or complex legal issues, and there is no conflict of opinion among the courts, or between the courts and administrative agencies. The court of appeals merely has confirmed the plain meaning of an unambiguous statutory provision. Section 6(b) of FIFRA provides for an administrative hearing to challenge only two categories of EPA actions: those "to cancel [a pesticide's] registration or to change its classification."[5] But neither this nor any other provision of FIFRA provides for an administrative hearing to challenge a decision to retain with additional safeguards (and not to cancel) a pesticide registration. A decision to retain pesticide registrations is subject to judicial review in the district court pursuant to Section 16(a) of FIFRA, 7 U.S.C. § 136n(a) (1976).

The question in this case is whether FIFRA provides for the hearing sought by EDF—not whether EDF is aggrieved by the Agency's actions or whether the legislative decision to limit public hearings under Section 6(b) to the subjects of cancellations and changes in classification was sound.

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[5] EDF's Petition misleadingly suggests that any "change" in the registration of a hazardous pesticide (Petition at i) or proposed "modifications in the conditions governing use of a dangerous pesticide" (*Id.* at 3) will present an occasion under the statute "to object and to participate in an administrative hearing" (*Id.* at i). But it is by no means every change or modification of a registration as to which a hearing is provided by Section 6(b). To the contrary, hearings are provided only on the two categories of action cited in the text, cancellations and changes in classification. Of course, only those "adversely affected" by such actions are entitled to request such hearings.

EDF has attempted to elevate the simple question presented by this case into a major issue of societal importance. Petitioner asserts that the lower court's ruling will "prevent any effective challenge to the adequacy of every future EPA plan for reducing hazards by any person directly exposed to the hazard." Petition at 8. This is not the case. Neither EDF nor any other public interest group has been deprived of a previously-held right to a hearing, or deprived of their multiple opportunities for public input into the Agency's pesticide decisionmaking process. Indeed, EDF has continued to participate in RPAR reviews of pesticides through submission of pertinent information and advocacy of its views on what actions should be taken. EPA considers this RPAR process to be the principal mechanism for assembling and reviewing scientific data about pesticide risks and benefits, and for reaching regulatory decisions. *See* 45 Fed. Reg. 52,628 (1980). Furthermore, once a cancellation action is initiated, and a registrant or other adversely affected party requests a hearing to oppose the cancellation action, EDF remains free to intervene in the hearing as an interested party, as it has done in the past, in support of the cancellation action.[6] Finally, under Section 16(a) of FIFRA, EDF has standing to seek district court review of Agency refusals to cancel pesticide registrations—precisely the type of Agency action which prompted EDF in this case to request an administrative hearing. *Cf. Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970).

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[6] In the second of its "Questions Presented for Review," EDF articulates the hypothetical question of whether it could argue, as an intervenor in a hearing requested as of right by a party adversely affected by a cancellation action, that the Administrator's notice does not initiate sufficiently restrictive measures (such as unconditional cancellation of particular uses). This question is hypothetical because in the instant case, no party (other than EDF) filed a timely request for a hearing. Accordingly, this question was not reached by the court of appeals and is not properly before this Court. *See* Opinion at 25, n.64. In any event the statute does not provide for a hearing on the subject of a decision to retain with additional safeguards and not to cancel a registration, regardless of whether the party requesting a hearing, or an intervenor in an otherwise properly convened hearing, seeks to address this subject.

Given the number of different points at which interested parties can participate in the decisionmaking process, EDF cannot reasonably complain that public interest groups are prevented from advocating their positions before the Agency decides upon a set of regulatory actions, or from challenging actions which may represent an abuse of Agency authority.

2. The Court of Appeals Fully Considered and Correctly Decided the Case

The sole question on the merits decided by the court of appeals was whether Section 6(b) of FIFRA provides for a public hearing to challenge the Agency's determination to retain with additional safeguards and not to cancel a pesticide registration. The court correctly held that FIFRA does not afford a hearing on such subject matter. The court's conclusion is supported fully by the plain language of Section 6(b), by the statute's underlying legislative history, and by analogous provisions in FIFRA and other statutes limiting the subject matter of public hearings.

a. The Language of the Statute

Section 6(b) establishes the procedure for initiation of cancellation actions; the statutory language does not encompass Agency determinations to retain pesticide registrations. Thus, the Administrator issues a "notice of his intent . . . to *cancel* [the pesticide] registration" 7 U.S.C. § 136d(b)(1) (1976) (emphasis added). Furthermore, there must be a "proposed action" which is the subject of a "notice issued under paragraph (1)" for there to be a "request for a hearing." Paragraph (1) explicitly limits the "proposed action" on which a hearing may be held to either cancellation of a registration or a change in its classification. *Id.* Accordingly, only cancellation or change in classification actions announced in the Administrator's notice can give rise to a public hearing under Section 6(b). That EDF may be "adversely affected" by the determination to retain Chlorobenzilate's citrus registrations cannot create a right to a public hearing where the statute does not provide for a hearing on that subject matter.

Apparently for reasons of administrative convenience, the Agency's decision to *retain* the citrus registrations of Chlorobenzilate was announced in a document captioned "notice of intent to cancel," along with the decisions to cancel all non-citrus registrations and to cancel any individual citrus registration not subsequently amended to incorporate the new safeguards specified in the notice. *See* 44 Fed. Reg. 9550 (1979). This Agency practice of expanding a Section 6(b)(1) notice to encompass both cancellation and non-cancellation actions cannot alter the statutory limitations on the subject matter of public hearings requested under Section 6(b). Thus, a hearing results from *cancellation* actions announced in a notice under Section 6(b)(1), and not from the notice itself (which may in fact announce non-cancellation actions as well).

b. Legislative History

There is nothing in the legislative history of FIFRA which would indicate that Congress ever intended the statute to afford an administrative hearing where, as here, a pesticide registration is being retained rather than cancelled.

Prior to 1972, only pesticide registrants could request a public hearing following issuance of a cancellation notice. In 1972, FIFRA was amended to allow "any person adversely affected by the notice" to request such a hearing. Legislative history reveals that this amendment was intended to broaden the class of persons who could request a hearing from pesticide registrants to pesticide users. *See* Opinion at 30-31.[7] Nothing in the legislative history indicates that Congress intended to

[7] EDF refers indirectly to a statement by Senator Hart that the 1972 amendments took "important strides in . . . the promotion of citizen participation in the regulatory process through comment before administrative agencies and litigation in the courts." 118 Cong. Rec. 32,259 (1972). *See* Petition at 12 and Opinion at 32, n.75. (The statement cited by the court omits the reference to "litigation in the courts.") Nothing in this statement, however, suggests that Congress intended to afford a trial-type administrative hearing on the subject of an Agency decision to retain a pesticide registration. Furthermore, as noted, EDF and other interested parties are able to participate in the regulatory process through RPAR submissions, and can seek judicial review under Section 16(a) of FIFRA.

expand the scope of the subject matter of such hearings. In this regard, the court of appeals stated as follows:

> [W]e find no persuasive indications that Congress intended to alter the function of section 6(b) hearings from the halting of and considering of challenges to cancellation decisions to include consideration of objections that noncancellation decisions are excessively permissive.

See Opinion at 32. Indeed, the 1972 amendments expressly demonstrate the congressional intent to vest federal district courts, and not Agency tribunals, with jurisdiction to review Agency refusals to cancel pesticide registrations. Section 16(a) of FIFRA, 7 U.S.C. § 136n(a) (1976).[8]

Congress could not have intended to afford a trial-type public hearing on the same subject for which it has made judicial review available in the district court under an arbitrary and capricious standard of review. *See* Opinion at 28. Furthermore, to afford a public hearing under Section 6(b) on retention actions would permit complete circumvention of the district court review intended by Congress. The order issued following a public hearing would be reviewable in the first instance by a court of appeals. Section 16(b) of FIFRA, 7 U.S.C. § 136n(b) (1976).

c. Statutory Pattern Limiting Subject Matter of Public Hearings

The court of appeals noted that its interpretation of Section 6(b) is consistent with other provisions of FIFRA affording the right to a public hearing. The court discerned a distinct pattern

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[8] Prior to 1972, there was no express provision for judicial review of refusals to cancel, suspend, or change classifications of pesticide registrations. In 1970, the Court of Appeals for the District of Columbia Circuit held that EDF, and groups similarly situated, had standing in federal court to seek review of the Secretary of Agriculture's refusal to suspend or cancel DDT. Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970). Subsequent to the court's ruling, Section 16(a) of FIFRA was adopted, expressly vesting district courts with jurisdiction to review "Agency refusals to cancel . . . and other final Agency actions."

whereby Agency actions resulting in more stringent regulation —such as a determination to deny an application for registration or to change the classification of the registration from general to restricted use—may be challenged in administrative hearings. There are no corresponding provisions for hearings, however, when just the opposite action is taken (*i.e.*, granting an application for registration or changing the classification of a registration from restricted to general use). *See* 7 U.S.C. §§ 136a(c)(5) and 136a(d)(3).[9]

It would be unsound governmental practice, and it cannot be ascribed as the intent of Congress, to require an agency head or his delegate to endure a trial-type hearing, before an administrative law judge within his own agency, to validate his determination not to take more stringent regulatory action than that he has determined to take in the exercise of his statutory authority. *See* Opinion at 32, n.79.

In contending that its interpretation of Section 6(b) is not inconsistent with FIFRA, EDF asserts that there is a distinction between "conditional cancellation" actions and other determinations which permit usage of pesticides. *See* Petition at 12. According to EDF, the granting of applications for registration, and refusals to cancel, are based upon an Agency determination that the pesticide in question will not cause "unreasonable adverse effects on the environment," whereas conditional cancellation notices are issued "only after the Administrator has found that the pesticide causes 'unreasonable adverse effects.'" *Id.*

This distinction is wholly illusory and represents a misstatement of the nature of conditional cancellation actions. EDF erroneously focuses on the effects of the pesticide as if it were unregulated, rather than on the effects, if any, when the pesticide is used in accordance with the terms and conditions for safe usage specified by the Agency in the conditional cancellation notice. Conditional cancellation means that the Administrator has determined that cancellation is warranted

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[9] Reclassification from restricted to general use is reviewable in the district courts under Section 16(a) of FIFRA. *See* 7 U.S.C. § 136a(d)(3) (1976).

only if certain safeguards are *not* adopted. This is because the Agency has found that usage of the pesticide will *not* result in "unreasonable adverse effects on the environment" if the safeguards are employed. *See* 44 Fed. Reg. 9550 (1979). While improper usage of the pesticide may produce unreasonable adverse effects, the Agency has determined that proper usage will not. In this sense, a conditional cancellation is no different than the granting of a registration. In either case, the decision has been made to allow the registration of the pesticide because it will not, when used in the manner specified by the Agency, cause unreasonable adverse effects on the environment.

CONCLUSION

For the reasons set forth above, respondent-intervenor respectfully requests that the petition be denied.

Respectfully submitted,

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